Supreme Court of the United States

October Term, 1972

No. 72-.....

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
A. L. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
E. B. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
DAVID C. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, and
R. E. SMITH, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,

Petitioners,

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR (NOW JAMES D. HODGSON), UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

JONES, BLECHMAN, WOLTZ & KELLY
Franklin O. Blechman
Herbert V. Kelly
E. D. David
2600 Washington Avenue
Newport News, Virginia 23607
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authority

Supreme Court of the United States

October Term, 1972

No. 72-.....

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
A. L. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
E. B. DRUCKER, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,
DAVID C. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, and
R. E. SMITH, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK,

Petitioners

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR (NOW JAMES D. HODGSON), UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

The petitioners, E. E. Falk, individually and as a partner in Drucker & Falk, et al., pray that a writ of certiorari issue to review the opinion and judgment of the Fourth Circuit

Court of Appeals of the United States rendered in these proceedings on September 11, 1972, as well as on March 3, 1971.

OPINIONS BELOW

Supreme Court. Certiorari was denied in *Falk* v. *Hodgson*, 404 U.S. 827 (1971) (App. C, *infra.*, p. 11).

Fourth Circuit. The first opinion of the Court of Appeals for the Fourth Circuit is reported at 439 F.2d 340 (4th Cir. 1971) (App. D, *infra.*, pp. 12-28), and the most recent opinion is not yet reported. (App. A, *infra.*, pp. 1-2).

District Court. The initial opinion of the United States District Court for the Eastern District of Virginia is reported in 312 F. Supp. 608 (E. D. Va. 1970) (App. E, *infra.*, pp. 29-40), and the second opinion is not reported. (App. B., *infra.*, pp. 3-10).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) to review the opinion and order of the Fourth Circuit Court of Appeals entered on March 3, 1971. September 11, 1972 and on

QUESTIONS PRESENTED

Your petitioners are rental agents for 30 independent rental unit complexes located in the Cities of Hampton, Newport News, Norfolk, and Richmond. The projects admittedly have no relationship one to the other except for the fact that they employ the same rental agents to care for the premises and collect the rents. It is also admitted that the owners of the apartment projects would not be covered by the Fair Labor Standards Act if they did not use the services of Drucker & Falk. Questions presented here relate to whether the petitioners are covered under the

enterprise amendments to the Fair Labor Standards Act. Those questions are:

1. Is a rental agent of various rental apartment projects, which have no relationship one to the other except a common rental agent, an enterprise within the meaning of the Fair Labor Standards Act? Phrased another way the question is whether an apartment owner, who is admittedly not covered by the Fair Labor Standards Act, comes within the Act's terms by the mere fact that the owner employs a rental agent who manages other rental apartments.

2. Under the Fair Labor Standards Act to be covered an enterprise must have an "annual gross volume of sales made or business done" of $500,000.[1] Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?

3. Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?

4. Should the Court decide this matter for the Government, is prejudgment interest appropriate?

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, together with the language of Section 3(s)(3) as is read prior to the 1966 amendments (75 Stat. 65, 66) as are reprinted in pertinent part in App. F, *infra.*, pp. 41-44.

---

[1] This is true for purposes of this litigation. Coverage now begins at $250,000.

CONCISE STATEMENT OF CASE

This action was instituted by the Secretary of Labor on January 30, 1969, under Section 17 of Fair Labor Standards Act of 1938, against the defendants who are partners in an apartment management firm called Drucker & Falk. The matter was submitted to the United States District Court for the Eastern District of Virginia on pretrial order and stipulation of facts. On January 16, 1970, The Honorable Richard B. Kellam handed down his decision dismissing the complaint, finding for the defendants on all issues. The Secretary appealed to the Fourth Circuit who, on March 3, 1971, reversed the District Court and remanded the case for further proceedings not inconsistent with the views expressed in its opinion. Writ of Certiorari was denied by this Court on October 12, 1971. On remand to the District Court, Drucker and Falk resisted the imposition of the judgment and the awarding of pre-judgment interest. The District Court found pre-judgment interest to be appropriate on July 28, 1971, which opinion was affirmed by the Fourth Circuit on September 11, 1972.

The activity of Drucker & Falk which is the catalyst for this case is its management of various apartment complexes within the State of Virginia. Drucker & Falk manages these apartments for various owners, the terms and obligations of that relationship being controlled by contract. Under this contract Drucker & Falk had two main obligations. The first was to lease and collect the rents for the apartment projects. As to this aspect the contracts varied in that they may call for Drucker & Falk to furnish the agents for this service and bear that cost or they may call for Drucker & Falk to merely supervise the personnel supplied by the owners, the owners bearing the cost. Where Drucker & Falk bore the cost of the clerical help, these employees

were paid at the appropriate overtime rate and consequently there is no dispute as to these employees. In the situation where the owners of the project paid the clerical help, the employees were not paid overtime.

The other main obligation of Drucker & Falk was to operate and maintain the property within the budget set by the owners, the entire cost to be borne by the owners. Since the employees were deemed to be those of the owners, they were not paid overtime.

It was this failure of the owners to pay overtime in the above situations which led to the institution of this suit against Drucker & Falk. Suit was not filed against the separate owners because it is admitted that the Fair Labor Standards Act did not reach to any one individual owner. The only way the employees of the various projects managed by Drucker & Falk could come under the Fair Labor Standards Act is by virtue of the government's theory, i.e., Drucker & Falk is the employer of the project employees *and* that Drucker & Falk is an enterprise engaged in commerce. Thus, what the government could not accomplish by coming into the front door, it sought to do by coming in the back door. The petitioners contend that there is no rear entrance for the government as far as their building is concerned.

To carry out its contractual management duties Drucker & Falk employs various management employees, including six area managers, and various clerical employees and rental agents, all of whom are admitted by petitioners to be their employees. Drucker & Falk carries out the day-to-day operations of each project through a maintenance superintendent or project manager who, under the supervision of the area manager, is in charge of each project, and who supervises the maintenance employees. The only element which ties

one apartment project to the other is the use of the same rental agent. As agent for the owner, Drucker & Falk works at his suffrage and at his direction.

As compensation for its services, the owners pay to Drucker & Falk a fixed percentage of the rentals collected. In no one apartment project managed by Drucker & Falk are the rentals greater than the statutory minimum, though if lumped together they are substantially in excess. Nor will the statutory minimum be met either by calculation of the individual commissions paid by each project to Drucker & Falk or by combining all those commissions together.

The District Court held that the employees in question were those of the owner, not Drucker & Falk; that the proper measure of business done was the gross commissions received; and that Drucker & Falk was not an enterprise. The Court of Appeals reversed each of these findings.

REASONS FOR GRANTING THE WRIT

The compelling reason for granting the writ in this case is that the Court has granted a writ in *Hodgson* v. *Arnheim and Neely, Inc., et al.*, No. 71-1598. The issue in *Arnheim and Neely*, and in this case, basically revolves around the interpretation to be given the enterprise amendments to the Fair Labor Standards Act. As the Secretary stated in his petition for a writ in the *Arnheim and Neely* case (No. 71-1598, memorandum for the Petitioner, pp. 7-8).

> This case and *Shultz* v. *Falk, supra,* are identical except for the immaterial fact that respondent's management activities are performed in connection with office buildings and an apartment complex, while those in *Falk* were performed in connection with apartment buildings only. Moreover, the precise contention accepted by the court below as the basis for its decision

—viz., that respondent's building management activities could not be treated as part of a single enterprise unless the interests of the building owners were also related—was rejected by the Fourth Circuit in *Falk*.

This case, as well as the *Arnheim and Neely* case, were test suits instituted by the Secretary of Labor about the same time. In this case, the Government was successful in the Fourth Circuit, whereas, it was unsuccessful in the Third Circuit decision of *Arnheim and Neely*. To resolve the divergent rulings of the Court below and of the Third Circuit in *Arnheim and Neely* is undoubtedly the reason this Court granted the Government's writ in *Arnheim and Neely*. If the writ is granted in this case, the opinions of the Fourth Circuit, as well as the Third, will be squarely before it, and thus, the Court will have the issues presented in the fullest possible manner.

If this writ is not granted, and the Court subsequently affirms the Third Circuit, a great injustice would be done to the petitioners. Drucker and Falk would then be faced with having to comply with the erroneous rulings of the Fourth Circuit when the law would clearly sustain their position.

The petitioners could also state at this point why this case should be heard on the merits. However, such an exposition is not necessary. The Court has already decided that the issues raised in this case are worthy of review since those issues are the same as in *Arnheim and Neely* and the facts of the two cases are almost identical. (See the petition for a writ of certiorari in the *Arnheim and Neely* case, No. 71-1598, and in *E. E. Falk, et als.* v. *James D. Hodgson*, No. 70-225).

The only new issue raised by the petitioners' writ is one concerning the awarding of prejudgment interest. Of course, this issue would not come into play if the peti-

tioners' position is sustained. If, however, the Secretary is successful, then the question of the awarding of prejudgment interest is important.

Basically, the petitioners' position is that with the making of new law, together with the fact that the petitioners did not have the use of the money and that the sum would be de minimis to the employee, the awarding of prejudgment interest is inequitable. In addition, your petitioners contend that Section 17 of the Fair Labor Standards Act will not allow the assessment of prejudgment interest. *Cf. Brooklyn Savings Bank* v. *O'Neill,* 324 U.S. 697 (1944); 2 *U.S. Code Cong. and Admin. News,* 1713, 87th Cong., 1st Sess. (1961).

The fact that this Court has once denied a writ to the petitioners would not affect the granting of a writ now and the subsequent review of all the issues raised in this case. *Mercer* v. *Theriot,* 377 U.S. 152, 12 L.ed 2d. 206, 84 S.Ct. 1157 (1964); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 60 L.ed. 629, 36 S.Ct. 269 (1916). Cf. *Erie* v. *Thompson,* 337 U.S. 163, 93 L.ed. 1282, 69 S.Ct. 1018, 11 ALR 2d. 252 (1949); *Messenger* v. *Anderson,* 225 U.S. 436, 56 L.ed. 1152, 32 S.Ct. 739 (1912).

Since this application is timely, the cases cited above make it perfectly clear that the Court can now grant a writ and review issues raised on the first appeal.

CONCLUSION

With the granting of the writ in *Arnheim and Neely* to resolve the divergent views between the Third Circuit and the Fourth Circuit in this case, the Court has already concluded that the issues raised merit the review of this Court. If the petitioners' writ is denied, a great injustice could be done to them. With this case before the Court, along with

Arnheim and Neely, the fullest presentation of the issues and the divergence between the Third and Fourth Circuit will be possible. For these reasons, therefore, this petition should be granted.

Respectfully submitted,

JONES, BLECHMAN, WOLTZ & KELLY
F. O. Blechman
Herbert V. Kelly
E. D. David
2600 Washington Avenue
Newport News, Virginia 23607
Counsel for Petitioners

December 8, 1972